SUPREME COURT. U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 870

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

RICHARD WALKER, DOROTHY WALKER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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RICHARD WALKER, DOROTHY WALKER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

State Farm Mutual Automobile Insurance Company (hereinafter called "Petitioner") prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Seventh Circuit reversing the judgment of the United States District Court for the Southern District of Indiana.

OPINIONS BELOW.

No opinion was rendered by the District Court for the Southern District of Indiana. Summary Judgment was entered upon findings of fact and conclusions of law. The opinion of the Court of Appeals for the Seventh Circuit

entered July 17, 1967 is reported at 382 F. 2d 548 and appears in Appendix A (pp. 11 to 18). The Order of the Court of Appeals for the Seventh Circuit denying the petition for rehearing en banc appears in Appendix B (p. 19).

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 17, 1967 (Appendix A, pp. 11). The Order of the Court of Appeals for the Seventh Circuit denying the petition for rehearing en banc was entered on September 7, 1967 (Appendix B, p. 19). The jurisdiction of the Court is invoked under *62 Stat. 928* (28 U. S. C. Sec. 1254(1)).

QUESTION PRESENTED.

The question presented is whether an attorney-client relationship exists only as between an automobile liability insurance carrier and the attorney retained by it and not between such attorney and the insured in the defense of an action against the insured.

STATE STATUTE INVOLVED.

The pertinent provisions of Section 4-3608 (Fifth) Indiana Annotated Statutes (Burns', 1946 Repl.) appear in Appendix C, *infra,* p. 20.

STATEMENT.

Petitioner issued a policy of automobile liability insurance to respondent Richard Walker in June, 1964. On July 3, 1964 respondent Walker was involved in an automobile accident in which his passenger, respondent Dorothy Walker, sustained certain personal injuries. Shortly thereafter respondent Richard Walker gave a statement to

petitioner's representative in which he exonerated himself from responsibility for the accident. Subsequently an action for personal injuries was brought by Dorothy Walker against Richard Walker in the state court under the "Indiana Guest Act," Section 47-1021 Indiana Annotated Statutes (Burns' 1965 Repl.). Petitioner employed counsel to appear and defend the action against its insured, Richard Walker, in accordance with its insurance policy requirements.

The pre-trial depositions of both parties to the state court action were scheduled for October 16, 1965. On that date, immediately before the commencement of the depositions, Richard Walker examined his previous statement and informed counsel that the statement was false. Counsel and Richard Walker appeared for the depositions at which time Richard Walker related a substantially different version of the accident than the version which appeared in his original statement. Immediately after the deposition, counsel took an *ex parte* statement from Richard Walker concerning the discrepancies between his earlier statement and his testimony on the pre-trial examination. Counsel then reported these events to petitioner and, within thirteen (13) days, pursuant to petitioner's instructions, counsel notified Walker on October 29, 1965, of petitioner's disclaimer of coverage because of his breach of the cooperation clause and withdrew from the defense of the personal injury action against Richard Walker on November 3, 1965, pursuant to the notice previously given the insured.

Subsequently, this diversity action seeking relief under the Federal Declaratory Judgment Act (72 Stat. 349, 28 U. S. C., Section 2201) was brought by the petitioner in the United States District Court for the Southern District of Indiana, where, on petitioner's motion, summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, was granted in favor of petitioner. On appeal,

the Court of Appeals for the Seventh Circuit reversed the judgment of the District Court, holding that fact questions were presented as to whether petitioner was prejudiced by Walker's breach of the cooperation clause and whether petitioner waived Walker's breach of the cooperation clause by virtue of counsel's conduct on or after October 16, 1965.

REASONS FOR GRANTING THE WRIT.

By its decision in the case at bar, the Seventh Circuit has held, in effect, that no attorney-client relationship exists between the insurance company and the attorney retained by it to defend an action brought against its insured. Further, the Court erroneously holds that an attorney-client relationship does exist between the attorney so retained and the insured, such that the attorney must protect and preserve from the insurance company, the secrets or confidences of the insured, which, if known by the insurance company, would avoid the insurance coverage afforded by its liability insurance policy. The decision of the Court of Appeals, in this respect, conflicts with the pronouncement of this Court with respect to the duty of an attorney to promptly advise his client of matters important to his client as stated by this Court in *Baker* v. *Humphrey et al.*, 101 U. S. 494, 500, 25 L. Ed. 1065, 1067 (1880).

> "It is the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive. * * *"

Furthermore, the Seventh Circuit's decision conflicts with the decision of the Court of Appeals for the Second Circuit affirming the District Court in *Car and General Insurance Corp.* v. *Goldstein*, 179 F. Supp. 888 (S. D. N. Y., 1959), aff'd 277 F. 2d 162 (2nd Cir., 1960). In a uniquely similar factual situation, the District Court in *Goldstein*

held that the insured's disclosure of his breach of the cooperation clause to the attorney retained by the insurance company was not privileged from disclosure by the attorney to the insurance company and that the attorney's conduct in documenting the insured's violation of the policy did not constitute a waiver or estoppel by the insurance company to assert the breach. This decision was affirmed by the Court of Appeals for the Second Circuit. 277 F. 2d 162 (2nd Cir., 1960).

This case presents a substantial question. The Seventh Circuit's decision is of nationwide significance among liability insurance companies, their insureds and the attorneys retained by the former to defend actions brought against the latter because the decision destroys the attorney-client relationship between the attorney and the liability insurance company. The Seventh Circuit's opinion in this cause dramatically alters the relationship between defense counsel, the insured and the insurance company in the great multitude of personal injury, death and property damage actions pending in the Federal and State trial courts because defense counsel must now assert his best efforts to protect the insured, sacrificing the interests of the insurance company where necessary to protect the insured.

As the Court of last resort in this country, the United States Supreme Court exercises the highest control over the lawyer's professional life. The Court's control is derived from the lawyer's relation to the responsibilities of the Court to advance the ends of justice. He becomes an officer of the Court and like the Court, itself, an instrument or agency to advance the ends of justice. *Theard* v. *United States of America*, 354 U. S. 278, 281, 1 L. Ed. 2d 1342, 77 S. Ct. 1274 (1957). In the case at bar under the decision of the Seventh Circuit a lawyer's duty to advance the ends of justice is obliterated by requiring him to sacrifice his fidelity to the insurance company client who re-

tained him, in preference to safeguarding the misdeeds of an insured in violation of his insurance policy.

The importance of fidelity and integrity among the legal profession was well expressed by this Court in *Baker* v. *Humphrey et al.*, 101 U. S. 494, at page 502, 25 L. Ed. 1065, 1068 (1880):

> "The legal profession is found wherever Christian civilization exists. Without it, society could not well go on. But, like all other great instrumentalities, it may be potent for evil as well as for good. Hence the importance of keeping it on the high plane it ought to occupy. Its character depends upon the conduct of its members. They are officers of the law, as well as the agents of those by whom they are employed. Their fidelity is guaranteed by the highest considerations of honor and good faith, and to these is superadded the sanction of an oath. The slightest divergence from rectitude involves the breach of all these obligations. None are more honored or more deserving than those of the brotherhood who, uniting ability with integrity, prove faithful to their trusts and worthy of the confidence reposed in them. Courts of justice can best serve both the public and the profession by applying firmly upon all proper occasions the salutary rules which have been established for their government in doing the business of their clients."

The Court of Appeals has implicitly and erroneously held there is no attorney-client relationship between an insurance company and its counsel retained to appear and defend a suit brought against the insured since the Court holds that the attorney has a duty at every peril to preserve the secrets of the insured from the insurer. No decision could be more opposite of the actual relationship between these parties. The insurance company, under its insurance contract exclusively selects and retains the attorney to defend a suit brought against its insured. The insured has no choice in the selection of counsel and counsel

does not accept his employment from the insured. The insurance company has complete control of the defense of such suit brought against the insured and, among other things, is entitled to make such investigation, negotiation or settlement of the claim as it desires. Instructions concerning the defense of the claim are given to the attorney by the insurance company. The insured has no voice in these matters and is not entitled to direct the actions of the attorney who has been retained to defend the suit. The insured may not discharge the attorney. Moreover, the attorneys' professional fee for his services is paid by the insurance company and not the insured. In those instances where the demand exceeds the coverage limits of the policy, the insured is informed that he is entitled to employ counsel of his own choice independently of insurance counsel, to protect his uninsured exposure. To require insurance counsel retained under these circumstances to safeguard the interests of the insured by concealing a policy violation from the insurer not only violates the insured's contractual obligations to his insurer; but to require insurance counsel to withhold such information from his client, the insurer, which is the mandate of the Seventh Circuit in the case at bar, compels him to violate his professional obligations to his client, the insurer, and destroys the attorney-client relationship existing between an insurer and its counsel.

The Court of Appeals in the case at bar based its holding that a fact question was presented as to whether your petitioner had waived the insured's breach of the cooperation clause, upon an Indiana Statute (Section 4-3608, Fifth, Indiana Annotated Statutes (Burns', 1946 Repl.)) defining the duties of an attorney which was enacted long before the present day concept of a liability insurance contract with its obligation to defend was known to our system of jurisprudence. The 1881 General Assembly of Indiana

could not have contemplated this present relationship. Decisions by some courts demonstrate a complete lack of awareness of the relationship. Under our current system of automobile liability insurance, the insurer controls the defense, investigation and settlement of the litigation and the insurance company is, and must of necessity be, the client of the attorney selected to defend litigation against the insured. The insured's interests are protected by the insurance carrier's contractual obligations to the insured. An examination of the relationship and a pronouncement by this Honorable Court of the respective rights and duties in this triangular situation is of utmost importance to the legal profession as well as the insurance industry and the policyholding public.

The effect of the Seventh Circuit's decision creates a complete division between the rights and interests of the insurance company and those of its insured. If the insured is the attorney's exclusive client, as the Seventh Circuit has held, his duty to the insured goes far beyond simply concealing the insured's secrets and misdeeds from the insurance company. He would be required to vigorously insist that the insurance company accept any settlement demand within the policy coverage limits and to take all appropriate steps in that direction, regardless of the quality or apparent merit of the defense in order to eliminate, as much as possible, the risk of exposing the insured's assets to a judgment in excess of his policy coverage limits. He would never be justified in submitting a question of fact concerning either liability or the measure of damages to a court or jury so long as the claim could be settled within the policy limits. In short, the attorney must sacrifice and trample the interests of the insurance company who retained him at every juncture of the lawsuit where the interests of the insured and the insurance company might conceivably be opposed. Obviously, the attorney's

duty of fidelity and allegiance to the insurance company who retained him is completely destroyed. The insurance company can no longer safely entrust the protection of its interests to the attorney of its choice. The insurer must necessarily view the attorney's advice and recommendations with the skepticism afforded to those who are adversaries and it can never have counsel upon whom it can rely with the assurance of his undivided loyalty and fidelity. The nationwide disruption of the orderly disposition of claims for injury and damage involving insurers and their insureds, as a result of the diverse interests of defense counsel and the insurance company is immediately apparent.

The greatest wellspring of civil litigation presented in trial courts of the various states and the Federal District Courts is the automobile accident claim for death, injury or property damage. The vast majority of the claims are defended by counsel employed by an insurance company under its public liability and property damage policy covering the automobile operated or owned by the defendant. Public liability insurance is either required or strongly encouraged by every State of the Union through its automobile or its operator's licensing laws. Similarly, every operator of a motor vehicle involved in an automobile accident is a potentially solvent defendant to the extent of his insurance coverage limits. Each instance presents probable conflict between the interests of the insurance company and the interests of the insured in which defense counsel retained by the insurer is forced to favor the interests of the insured and sacrifice the interests of the insurance company.

The interests of the American bar, the insurance industry and the policyholding public justify an authoritative statement from this court of the relationship and respective

duties owed by counsel to the insurance companies who retain them to defend claims brought against their insured and to the insureds.

CONCLUSION.

The impact of the Seventh Circuit's decision in this case upon the tri-party defense relationship which exists in a substantial percentage of cases pending in the trial courts of the Federal judiciary and those of the several States will further disrupt and delay the orderly and judicious disposition of thousands of automobile accident suits. The lawyer's confusion and the insurance company's distrust for the fidelity of the attorney it has employed, both of which is generated by the opinion of the Court of Appeals, will not only harm the judicial system of this country, but will also damage its repute in the eyes of our citizenry, who, in ever increasing numbers are automobile operators and liability insurance policyholders. We respectfully submit that the Supreme Court of the United States should, in advancing the ends of justice, establish realistic and practical guidelines for the members of the legal profession, who are officers of the Courts, in this new attorney-client relationship generated by today's automotive society. For these reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit.

September Term, 1966—April Session, 1967.

No. 16061.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Plaintiff-Appellee,
vs.
RICHARD WALKER, DOROTHY WALKER,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.

July 17, 1967.

Before KNOCH, KILEY and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This is a diversity action seeking relief under the Federal Declaratory Judgment Act (28 U. S. C. § 2201). Plaintiff State Farm Mutual Automobile Insurance Company ("State Farm") is an Illinois corporation with its principal office and place of business in Bloomington, Illinois. The defendants are Richard Walker and his former wife, Dorothy Walker, who are Indiana citizens.

Richard Walker held an automobile insurance policy issued by State Farm. In the policy the insurer agreed to defend any suit against Richard Walker seeking dam-

ages for bodily injury or property damage caused by accident arising from the use of the insured's car. The policy also contained the following clause:

> "The insured shall cooperate with the Company and upon its request, attend hearings and trials, assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceedings in connection with the subject matter of this insurance."

At 6:00 P.M. on July 3, 1964, Mr. and Mrs. Walker were traveling along Indiana State Highway 67 near Martinsville, Indiana, when an accident occurred while Mr. Walker was driving. Five days after the accident, Walker gave a statement to State Farm that the accident was caused in an effort to avoid an oncoming car on his side of the highway. Walker also advised State Farm that Mrs. Walker had not complained about his driving. The following day, Mrs. Walker allegedly gave a statement to State Farm confirming her former husband's version of the accident.

On October 13, 1964, Mrs. Walker sued Mr. Walker for $50,000 for damages she suffered in the accident. In the state court complaint, she alleged that Mr. Walker was traveling at 65 miles an hour on a rain-slick roadway, and that over her repeated admonitions to slow down, he attempted to pass a car ahead of his Oldsmobile, causing him to lose control of his car so that it ran into a ditch. Pursuant to the insurance policy, State Farm employed attorneys to defend the action against Mr. Walker.

On October 16, 1965, Richard Walker's deposition was to be taken by counsel for his former wife in her damage suit. Beforehand, in a conversation with his attorney, Walker denied the veracity of his July 8 statement and said that he had lost control of his car in an effort to pass a Cadillac ahead of him. He then testified in the

deposition taken in his former wife's lawsuit that she had admonished him about the manner and speed of his driving and that the accident occurred in his effort to pass a Cadillac ahead of his car. Nothing was said about another automobile proceeding from the opposite direction in his lane. Mrs. Walker's deposition of the same date confirmed her former husband's second version of the accident.

Just after the completion of the depositions of Mr. and Mrs. Walker, his attorney took his statement *ex parte* and under oath. In that statement, Walker admitted that his preceding deposition was contrary to the statement he had given to State Farm on July 8, 1964. He said that he had not mentioned the Cadillac in the earlier statement because he was leery of losing his insurance, had been convicted of speeding, and had previously had a drunken driving charge against him. As to his earlier statement, he said:

> "I never lied for any reason other than to try to save my damned insurance or what have you."

On October 29, 1965, State Farm notified Richard Walker that it was disclaiming liability under the policy and was withdrawing from his defense in Dorothy Walker's suit on the ground that he had breached the cooperation clause contained in the insurance policy. On November 3, 1965, counsel withdrew their appearance for Richard Walker in that lawsuit, which was scheduled for a November 8, 1965, trial. The case was subsequently to be re-set for trial, but no trial date has yet been fixed.

The District Court found that Walker had breached the cooperation provision of the insurance policy by giving a false version of the accident to State Farm "during its investigation",[1] and that his breach misled State Farm

1. The investigation took place in July 1964, so that the District Judge apparently considered Walker's first version to be false. Similarly, in several places State Farm's brief treats the first version as false.

"to its disadvantage in the handling of Dorothy Walker's claim in an essential matter". The District Court also found that State Farm had not waived Walker's breach of the cooperation provision of the policy by continuing to defend him after it was aware of the breach. The court thereupon granted State Farm's motion for summary judgment, relieving the insurer of its obligations under the policy for claims arising out of the July 3 automobile accident.

On appeal, Mr. and Mrs. Walker contend that summary judgment was improper on the ground that there are genuine issues as to material facts. See Rule 56(c) of the Federal Rules of Civil Procedure. We of course stand ready to approve summary judgments when the terms of Rule 56 are satisfied (see *Markwell* v. *General Tire and Rubber Co.*, 367 F. 2d 748 (7th Cir. 1966), but here certain material facts remain controverted, so that summary judgment was improper.

This being a diversity action, Indiana law is decisive. In that state, it has been held that a breach of the cooperation clause occurs when, as here, an insured furnishes false information of a material nature to the insurer. *Motorists Mutual Insurance Company* v. *Johnson*, 218 N. E. 2d 712, 716 (Ind. App. 1966). However, under Indiana law, the insurer is required to establish prejudice resulting from the insured's breach of the cooperation clause in order to be relieved of its contractual obligations. *Idem* at p. 715.[2] But it has been said that an insurer is not

2. *Potomac Insurance Company* v. *Stanley*, 281 F. 2d 775 (7th Cir. 1960), was decided prior to the *Johnson* case and even in *Stanley* the breach was held to be "*per se*, prejudicial" (at p. 781). The failure of the insured Stanley to attend the trial or cooperate in any way with the insurer would be prejudicial as a matter of law. But cf. *State Farm Mutual Automobile Insurance Co.* v. *Koval*, 146 F. 2d 118, 120 (10th Cir. 1944). See also 14 *Couch on Insurance* 2d §§ 51:101, 51:107; 8 Appleman *Insurance Law and Practice* §§ 4773, 4782; 34 ALR 2r at pp. 267-268.

prejudiced unless the breach will produce a judgment less favorable to it in the tort suit. See Note, "Liability Insurance Policy Defenses and the Duty to Defend", 68 Harv. L. Rev. 1436, 1441 (1955). At this time, any answers to the question whether State Farm has been prejudiced in its defense of the underlying tort action would be speculative. This inherent uncertainty has prompted courts to postpone or deny declaratory relief when the underlying tort action is pending. *Idem* at pp. 1449-1450.

Defendants insist that State Farm was not prejudiced because after Richard Walker's October 16, 1965, *ex parte* sworn statement and deposition three weeks prior to the trial date, State Farm made no attempt to settle the case, continue the depositions, investigate further, or obtain a postponement of the trial date. On the other hand, State Farm claims it might have offered to settle Dorothy Walker's suit if it had not been misled by the July 8, 1964, statement of Richard Walker. However, the October 1964 complaint in Dorothy Walker's state court action against her former husband was on the same theory as Mr. and Mrs. Walkers' October 16, 1965, depositions and his *ex parte* statement. In contrast to Walker's first version of the accident, the complaint alleged that he was driving "in excess of 65 miles an hour and over the repeated admonitions of plaintiff [Dorothy Walker] to slow down, willfully and wantonly attempted to pass a vehicle in front of his vehicle and as a result of which willful and wanton misconduct the defendant [Richard Walker] lost control of his vehicle and ran off the said Indiana State Road 67 into a ditch * * *". Thus the October 1965 version of the accident was not a bolt from the blue. The complaint itself put State Farm on notice that it had a potentially serious trial ahead. Since October 1964, State Farm had ample time to investigate the allegations that the accident had been caused by Walker's passing a car ahead of him and to negotiate a

settlement.[3] If necessary, State Farm could doubtless have obtained a continuance of Mrs. Walker's suit. In fact, the state case has not yet been tried, nor has a trial date been set.[4] In these circumstances, there is clearly an issue of fact as to whether State Farm was prejudiced by Walker's breach of the cooperation clause, so that summary judgment was not justified. Cf. *Standard Accident Insurance Co.* v. *Winget,* 197 F. 2d 97 (9th Cir. 1952).

There is also a factual question whether State Farm waived Walker's breach. On October 16, 1965, his counsel, selected by State Farm to defend Dorothy Walker's suit for $50,000 damages, was apprised by Walker that his earlier version of the accident was untrue and that actually the accident occurred because he lost control of his car in passing a Cadillac just ahead. At that point, Walker's counsel should have refused to participate further in view of the conflict of interest between Walker and State Farm. *Allstate Insurance Co.* v. *Keller,* 17 Ill. App. 2d 44, 50-53, 149 N. E. 2d 482, 485-487 (1st Dist. 1958); see *Valladao* v. *Fireman's Fund Indemnity Co.,* 13 Cal. 2d 322, 89 P. 2d 643, 645-646 (1939).[5] Instead he participated in the ensuing depositions of the Walkers, even took an *ex parte* sworn statement from Mr. Walker in order to advise State Farm what action it should take, and later used the statement against Walker in the District Court. This action appears

3. Defendants claim that State Farm was not interested in settling even after it learned the second version of the accident. On deposition, its Resident Claim Superintendent testified that State Farm had no reason to consider liability even after the depositions of the Walkers were taken.

4. On motion of Dorothy Walker's counsel, the November 8, 1965, trial date was vacated.

5. See also *T. C. & Theatre Corp.* v. *Warner Bros. Pictures,* 113 F. Supp. 265, 269 (S. D. N. Y. 1953); *Schwartz* v. *Sar Corporation,* 195 N. Y. S. 2d 496, 503, 505 (Sup. Ct. 1959), reversed on other grounds, 195 N. Y. S. 2d 819 (App. Div. 1959); *American Employers Insurance Co.* v. *Goble-Aircraft Specialties,* 131 N. Y. S. 2d 393, 401 (Sup. Ct. 1954).

to contravene an Indiana attorney's duty "at every peril to himself, to preserve the secrets of his client" [Richard Walker] (Section 4-3608 Sixth Burns Indiana Statutes). This statement was hardly in Walker's best interest, for as State Farm's brief acknowledges, it revealed "an essential element to * * * Dorothy Walker's action under the Indiana Guest Statute". In our view, Walker's counsel's conduct on and after October 16, 1965, raises a question of fact as to whether State Farm waived Walker's breach of the co-operation clause. This would depend, for example, on the relationship between State Farm and the counsel it had selected for Walker. The testimony of Walker, his then counsel and officials of State Farm is needed to resolve this waiver question.

REVERSED AND REMANDED.

No. 16061

KNOCH, *Circuit Judge* (dissenting). I must respectfully disagree with the majority. I would affirm the judgment in this case. It is uncontroverted that the insured Richard Walker intentionally furnished false and misleading information to the plaintiff. I cannot agree that actual proved prejudice in the form of a "less favorable" tort judgment is essential to plaintiff's recovery under Indiana law in the light of the Johnson case. When the majority assert that prejudice must be established under Johnson, it seems to me that a strained interpretation is being placed on the statement in that opinion. The Court there said (p. 715):

> "A technical or inconsequential lack of cooperation has often been held insufficient to void the policy and the lack of cooperation to be sufficient must be in some substantial and material respect. Non-cooperation must be material. Prejudice must be shown by insurer. 7 Am. Jur. 2d, Automobile Insurance, §§ 176, 181, pp. 508, 509, 517. See also 60 A. L. R. 2d 1138, 1150."

The repudiation of a statement which if true would constitute a defense to the action can hardly be called a technical or inconsequential lack of cooperation. Surely deliberately misleading information is as prejudicial per se as failure to attend a trial as in the *Stanley* case.

Nor can I agree that there are any factual disputes which might form the basis of a waiver by the plaintiff. The factual allegations of the Complaint filed by Dorothy Walker were no notice that the apparently complete defense asserted by the insured was a lie. Similarly I see no support for a finding of waiver in the cautionary procedure of taking additional statements from the insured, who was bound to make full and frank disclosure to the plaintiff, to ascertain whether he had in fact deliberately lied to the plaintiff and thus failed to perform an important condition precedent to enforcement of the contract for his own benefit.

APPENDIX B.

UNITED STATES COURT OF APPEALS.
For the Seventh Circuit,
Chicago, Illinois 60604.

Thursday, September 7, 1967.

Before

Hon. John S. Hastings, Chief Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Walter J. Cummings, Jr., Circuit Judge

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Plaintiff-Appellee.
No. 16061 *vs.*
RICHARD WALKER and DOROTHY WALKER,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.

IT IS ORDERED by the Court that the petition for rehearing en banc be, and the same is hereby DENIED.

APPENDIX C.

SECTION 4-3608, Indiana Annotated Statutes (Burns' 1946 Replacement).

DUTIES OF ATTORNEY.—It shall be the duty of an attorney:

* * * * *

FIFTH. To maintain inviolate the confidence, and, at every peril to himself, to preserve the secrets of his client.

* * * * *

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 870

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, - - - Petitioner,

versus

RICHARD WALKER,
DOROTHY WALKER, - - - - - Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 870

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, - - - *Petitioner,*

v.

RICHARD WALKER,
DOROTHY WALKER, - - - - - *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

QUESTIONS PRESENTED.

Respondents respectively submit that petitioner is in error as to its version of the question presented. There was no question presented to the Court of Appeals for the Seventh Circuit as to whether an attorney-client relationship exists only as between an insurance

carrier and the attorney retained by it and not between such attorney and the insured in the defense of an action against the insured. Nor did the judgment of said Court below decide such question. The judgment below only determined two issues under Indiana law; namely, that the facts in this particular case there was a question for the jury whether the petitioner had been prejudiced and whether it had waived any breach of the cooperation clause. In effect, there is no question presented for this Court's determination.

STATEMENT.

On June 12, 1964, the petitioner executed and delivered to the respondent, Richard Walker, its certain automobile insurance policy, covering the respondent's automobile. On July 3, 1964, while said policy of insurance was in full force and effect, the respondent, Richard Walker, was involved in an accident, at which time the respondent, Dorothy Walker, was a passenger, and as the result of which she received serious injuries. Thereafter on October 13, 1964, the respondent, Dorothy Walker, sued the respondent, Richard Walker, for her personal injuries alleging that the respondent, Richard Walker, was guilty of certain acts of willful and wanton misconduct. The petitioner-insurance company thereafter appeared for the respondent, Richard Walker, and undertook his defense on the 26th day of October, 1964. On February 23, 1965, said cause was assigned for trial for November 8, 1965. On October 16, 1965, the depositions of both

parties to the state court action were taken by respective counsel for both sides. Prior to this, however, Richard Walker, told his attorney that a statement taken of him on July 8, 1964, by an adjuster for the insurance company was incorrect to a certain extent. Just after the completion of the depositions, Walker's attorney took an *ex parte* statement from him under oath in which he told his attorney again substantially the same thing that he told him prior to the taking of the depositions. Walker had no idea why said statement was being taken of him. Attorney Robert H. Hahn testified under oath that during his conference with his client prior to the taking of the depositions he had suspicions of collusion. He did not advise his client of his suspicions at that time or any other time. He did not postpone the taking of the depositions because he saw no reason to postpone them. He states that the insured testified the same in his pretrial deposition as he told Attorney Hahn previously to the taking of the deposition. Attorney Hahn took an *ex parte* statement from his client after the taking of the depositions, but he did not advise his client as to why he was taking it. The purpose for which he took the *ex parte* statement from his client "was to have a record upon which to advise my client as to what action, if any, they should take concerning this particular litigation." At that time he was still the attorney for the respondent, Richard Walker. On October 29, 1965, the petitioner notified the respondent, Richard Walker, that it would no longer defend him

and was withdrawing from the case. On November 4, 1965, the petitioner initiated the cause of action here under consideration in the United States District Court for the Southern District of Indiana by filing its complaint for Declaratory Judgment. In addition to the reasons given by petitioner, the Court of Appeals for the Seventh Circuit reversed the judgment of the District Court for the additional reason that certain material facts remained controverted so that summary judgment was improper.

ARGUMENT.

It is respectfully submitted that petitioner is in error when it states, on page 4 of its brief, that the Seventh Circuit has held that no attorney-client relationship exists between the insurance company and the attorney hired by it to defend an action brought against its insured. In this respect, the only thing that the Seventh Circuit decided was that "There is also a factual question whether State Farm waived Walker's breach. * * * In our view, Walker's counsel's conduct on and after October 16, 1965, raises a question of fact as to whether State Farm waived Walker's breach of the cooperation clause. This would depend, for example, on the relationship between State Farm and the counsel it had selected for Walker. The testimony of Walker, his then counsel and officials of State Farm is needed to resolve this waiver question."

The opinion does not hold that counsel could not communicate the insured's confidential information to the insurer or that there is no attorney-client relationship between an insurance company and its counsel retained to appear and defend a suit brought against the insured. Nor does the opinion require insurance counsel to conceal policy violations.

On page 4 of its brief, petitioner cites the case of *Car & General Insurance Corp.* v. *Goldstein,* 179 F. Supp. 888 (S.D.N.Y., 1959), affd. 277 F. 2d 162 (2nd Cir., 1960), as being in conflict with the Seventh Circuit's decision in this case. We respectfully submit that there is no conflict whatsoever between these two decisions for the reason that in the *Goldstein* case the attorney, after procuring the defendant's signed statement, *immediately* withdrew as defendant's counsel. They did not purport to thereafter represent the defendant in the taking of his deposition and thereafter purport to represent him in the taking of a deposition of the plaintiff or to still purport to represent him when taking an *ex parte* statement from him, as the undisputed facts are in this instant case.

An attorney is required to disclose to his client all facts and circumstances within his knowledge, which in his honest judgment might be likely to affect the performance of his duty for that client. A client may presume from an attorney's failure to disclose matters material to his employment that the attorney has no interest which will interfere with his devotion to the cause confided in him, or betray his judgment.

Allstate Ins. Co. v. *Keller,* 17 Ill. App. 2d 44, 149 N. E. 2d 482, (1958).

Canons of Professional and Judicial Ethics, Sec. 6, A. B. A.

American Employers Ins. Co. v. *Gobel Aircraft Specialties, Inc.,* 205 Misc. 1066, 131 NY. S. 2d 393, 401, (1954).

The Reporter pointed out in footnote numbered 10, at page 889, in the *Goldstein* case:

> "A summary judgment should not be granted lightly, and if there is the *slightest* doubt as to the facts, litigant has the right to a trial. Fed. Rules Civ. Proc. R56, 28 U.S.C.A" (Our Emphasis).

Moreover, we call the Court's attention to the proposition that there is no conflict between the decisions of the various Circuit Courts, and particularly between the Second Circuit and the Seventh Circuit, as alleged by petitioner, for the further obvious reason that in the *Goldstein* case the Second Circuit there was rendering its decision solely under New York State law, while the Seventh Circuit in the instant case based its decision solely upon Indiana State law. Certainly, if by chance Indiana law and statutes differ from New York State law and statutes, neither this Court, nor any Court, could resolve those differences for the reason that they are questions peculiar to each individual state. The Seventh Circuit in the instant case held "This being a diversity action, Indiana law is decisive."

The petitioner has never challenged the accuracy of that statement.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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